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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

DAVID ALUF et al.,

Plaintiffs and Appellants,

v.

DAVID BANKS et al.,

Defendants and Respondents.

A132015

(City and County of San Francisco
Super. Ct. No. 492400)

David Aluf and Yowie Stromberg appeal from the judgment and certain post-judgment orders, contending that the trial court abused its discretion in denying prejudgment interest and in awarding sanctions to defendants David Banks, Ruby Dominguez, and Lee Banks. We affirm.

FACTUAL BACKGROUND

Preliminarily, we note that plaintiffs have not provided a properly supported statement of facts in their opening brief. The California Rules of Court require that litigants provide a summary of the significant facts supported by references to the appellate record. (Cal. Rules of Court, rule 8.204 (a)(1)(C); (2)(C); see *Arbaugh v. Procter & Gamble Mfg. Co.* (1978) 80 Cal.App.3d 500, 503, fn. 1 [failure to comply with the Rules of Court requiring summary of material facts supported by appropriate reference to the record may constitute waiver of error].) We caution counsel in the future to adhere closely to the requirements of California Rules of Court, rule 8.204 in the preparation of appellate briefs. The failure to do is not only vexing to opposing counsel, but unnecessarily burdens this court's resources.

As far as we can ascertain, plaintiffs filed a complaint for fraud against defendants arising out of the parties' landlord/tenant relationship in September 2009. The case proceeded to trial in August 2010. After the jury had reached a verdict in the liability phase of the case and the court was prepared to commence with the punitive damages portion of the trial, the parties advised the court that a settlement had been reached. The parties entered into a settlement agreement and the terms were placed on the record on August 27, 2010. The agreement required that defendants pay plaintiffs the sum of \$130,000 by September 30, 2010 in exchange for a release and dismissal of all claims. Defendants made a partial payment of \$30,000 on October 4, 2010. On November 18, 2010, defendants notified plaintiffs' counsel that defendants were prepared to pay the remaining \$100,000 in exchange for a signed release. The parties were unable to complete the settlement.

On November 29, 2010, plaintiffs filed a motion for entry of judgment pursuant to Code of Civil Procedure section 664.6. The court held a hearing on the motion on January 7, 2011. The court found that the settlement terms were "very clear" and entered judgment against the defendants in the amount of \$130,000 with a \$30,000 credit against the judgment. The court found that a full mutual release was executed and that no further release was necessary or required as a precondition of making the full payment of the judgment amount. The court declined to order prejudgment interest because the issue was not addressed in plaintiffs' motion. The court ruled that if plaintiffs wished to pursue interest, a noticed motion was required.

On February 8, 2011, plaintiffs moved for prejudgment interest, claiming that interest should run from September 30, 2010. Plaintiffs also moved for a new trial on the issue of prejudgment interest. On March 11, 2011, the court entered the judgment in favor of plaintiffs and against defendants, jointly and severally in the amount of \$130,000 with a credit of \$30,000. The court denied the motion for prejudgment interest on March 14, 2011, finding that the request should have been made at the time of the Code of Civil Procedure section 664.6 motion. Defendants paid plaintiffs the balance of the judgment owed on March 15, 2011.

On April 29, 2011, defendants moved to compel the filing of a satisfaction of judgment and for sanctions on the ground that plaintiffs should have filed a satisfaction of judgment form pursuant to Code of Civil Procedure section 724.050, and that as a result of their failure to do so, defendants were required to prepare and file an opposition to a second motion for a new trial on prejudgment interest. On May 10, 2011, the court denied the second motion for a new trial. Plaintiffs filed the satisfaction of judgment on May 11, 2011. On June 20, 2011, the court entered an order denying defendants' motion to compel satisfaction of judgment as moot and granting the motion for sanctions. The court ordered plaintiffs to pay defendants' counsel the sum of \$3,140.00, finding that plaintiffs unnecessarily required defendants to file the motion to compel satisfaction of judgment.

DISCUSSION

Plaintiffs contend that they are entitled to prejudgment interest pursuant to Civil Code section 3287, subdivision (a) which provides that a person is entitled to recover prejudgment interest when the amount of damages claimed was certain. They argue that the amount of damages was certain on September 30, 2010, the date provided in the settlement agreement for payment.

Civil Code section 3287, subdivision (a) provides for an award of prejudgment interest when a party is entitled to recover "damages certain, or capable of being made certain by calculation." " 'Damages are deemed certain or capable of being made certain within the provisions of subdivision (a) of [Civil Code] section 3287 where there is essentially no dispute between the parties concerning the basis of computation of damages if any are recoverable but where their dispute centers on the issue of liability giving rise to damage.' " (*Wisper Corp. v. California Commerce Bank* (1996) 49 Cal.App.4th 948, 958; quoting *Esgro Central, Inc. v. General Ins. Co.* (1971) 20 Cal.App.3d 1054, 1060.) The statutory provision does not apply to the action here, where the issue of damages was disputed. The parties did not reach a settlement in this fraud action until after the jury had reached a verdict and the punitive damages portion of the trial was set to begin. Under these circumstances, an award of prejudgment interest was

discretionary. (See Civil Code, §§ 3287, subd. (b) [court has discretion to award prejudgment interest where the claim is unliquidated]; 3288 [“in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury”].)

Plaintiffs argue, however, that Civil Code section 3287 applies to the settlement agreement because damages became “certain” when the \$130,000 became due on September 30, 2010. We need not decide the question of whether section 3287 can apply to a settlement agreement that does not, by its terms, provide for interest on the unpaid, overdue balance, because we conclude that plaintiffs’ request was not timely.

In order to obtain an award of prejudgment interest, plaintiffs were required to make a timely request in the trial court. (See *North Oakland Medical Clinic v. Rogers* (1998) 65 Cal.App.4th 824, 829 (*Rogers*).) The court here declined plaintiffs’ request for prejudgment interest because the request was not made in their motion for entry of judgment. The court’s ruling was correct. “[P]rejudgment interest should be awarded in the judgment on the basis of a specific request therefor made *before* entry of judgment.” (*Id.* at p. 830, see Cal. Rules of Court, rule 3.1802 [“The clerk must include in the judgment any interest awarded by the court”].)¹

Plaintiffs argue, however, that they were entitled to raise the issue in a motion for a new trial, citing *Rogers*. While *Rogers* does hold that a request for prejudgment interest can be made in a motion for new trial on the ground of excessive or inadequate damages, pursuant to Code of Civil Procedure section 657, subdivision 5 (*Rogers, supra*, 65 Cal.App.4th at p. 830), that motion is not available to plaintiffs here because judgment

¹ Plaintiffs do not seriously contend that their belated request for prejudgment interest (either in their reply papers on the motion for entry of judgment or by request at the hearing on the motion—it is unclear which) qualifies as a timely request. They do complain that they lost three months of post-judgment interest because the judgment was not entered until March 11, 2011. But this loss was of plaintiffs’ own making. The court ordered entry of judgment on January 7, 2011, and stated in the order that it would enter a judgment as of that date upon receipt of a proposed judgment. The record does not show, however, when the plaintiffs *submitted* the proposed judgment. Additionally, the judgment that was entered—which was prepared by *plaintiffs*—failed to include in its provisions the court’s order that entry of judgment was effective as of January 7, 2011.

was entered on a settlement, not a trial, and plaintiffs therefore cannot claim the damages were either excessive or inadequate.

Plaintiffs' reliance on *Steiny & Co. v. California Electric Supply Co.* (2000) 79 Cal.App.4th 285 for the proposition that their request was not untimely even though it was made after the settlement was entered is misplaced. There, the court held that an award of prejudgment interest could be adjudicated in a postjudgment hearing because the parties had provided in their stipulated settlement that the issue of prejudgment interest would be determined by the court subsequent to the entry of judgment. (*Id.* at pp. 290, 294.) There was no agreement concerning prejudgment interest here, and the court declined to award prejudgment interest to plaintiffs after the settlement was made and the judgment was entered. No error appears.

Plaintiffs further contend that the court erred in awarding sanctions to defendants. Defendants sought sanctions pursuant to Code of Civil Procedure section 724.050² because they were required to file a motion to compel satisfaction of judgment after numerous attempts to secure plaintiffs' compliance with the Code of Civil Procedure section 724.030. That statute required that the judgment creditor immediately file the acknowledgement when the money judgment is satisfied. (Code of Civ. Proc., § 724.030.) Inasmuch as plaintiffs failed to comply with Code of Civil Procedure section 724.030, the court properly awarded defendants sanctions pursuant to section 724.050 providing that a judgment creditor, who fails to comply with the requirement of filing a satisfaction of judgment upon written demand, "is liable to the person who made the demand for all damages sustained by reason of such failure" (Code of Civ. Proc., § 724.050, subd. (e).) The court was thus authorized to award sanctions to defendants.

² Code of Civil Procedure section 724.050 provides in pertinent part that "[i]f a money judgment has been satisfied, the judgment debtor . . . may serve . . . on the judgment creditor a demand in writing that the judgment creditor [¶] [f]ile an acknowledgement of satisfaction of judgment with the court. [¶] . . . [¶] If the judgment has been satisfied and the judgment creditor fails without just cause to comply with the demand [within 15 days after actual receipt of the demand], the judgment creditor is liable to the person who made the demand for all damages sustained by reason of such failure and shall also forfeit one hundred dollars (\$100) to such person"

Plaintiffs contend that Code of Civil Procedure section 724.050, subdivision (e) authorized the court to award damages, but not attorney fees or sanctions. This argument was not raised below, and is therefore waived. (*Martinez v. Scott Specialty Gases, Inc* (2000) 83 Cal.App.4th 1236, 1249 [arguments not asserted below are waived and will not be considered for the first time on appeal].)

Plaintiffs argue that the award was entered without just cause and that the amount of sanctions included amounts to which defendants are not entitled. They, however, have not provided this court with a transcript of the hearing in which the matter was addressed.

It is well settled that a party challenging a judgment has the burden of showing reversible error by an adequate record. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 628, p. 704.) “Where no reporter’s transcript has been provided and no error is apparent on the face of the existing appellate record, the judgment must be *conclusively presumed correct* as to *all evidentiary matters*. To put it another way, it is presumed that the unreported trial testimony would demonstrate the absence of error.” (*Estate of Fain* (1999) 75 Cal.App.4th 973, 992.) In the absence of an adequate record here, we are unable to conclude that the court’s order was in error.

Finally, defendants request sanctions, contending that this appeal is frivolous. Although we affirm the judgment below, we cannot conclude that the appeal was so lacking in merit as to warrant an award of sanctions nor is there any evidence that the appeal was brought for an improper motive. (See *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650-651.) We therefore deny the request for sanctions on appeal.

DISPOSITION

The judgment and orders are affirmed.

RIVERA, J.

We concur:

RUVOLO, P. J.

REARDON, J.